



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Tuddenham et al. v. The Owners, Strata Plan K 660*
2018 BCCRT 421

B E T W E E N :

Kyla Tuddenham (a.k.a. Kyla Coulthard), Lea Sirr, Alice Jeffries,
Giovanni Pozza, Douglas McBride and Lauren Henry

APPLICANTS

A N D :

The Owners, Strata Plan K 660

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Michael F. Welsh, Q.C.

INTRODUCTION

1. Does the cutting down of 12 pine trees by a strata corporation on its common property constitute a significant change in the use or appearance of that common

property? If so, does it require prior authorization by resolution passed by a $\frac{3}{4}$ vote of strata owners in a general meeting? Or is it a matter of repair of property which falls within the strata corporation's mandate and requires no vote? That is the issue I have to determine on the facts of this case.

2. The 6 applicants are some of the strata lot owners in the respondent strata corporation (strata). They are represented by Ms. Kyla Tuddenham. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act (Act)*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to determine this dispute through written submissions as I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate. Later in this decision I return to how this discretionary authority will be applied in this case.

ISSUES

7. The issues in this dispute are:
 - a. Was removal of the 12 pine trees from the strata's common property a significant change in the use or appearance of that common property under Section 71 of the *Strata Property Act*, (SPA)?
 - b. If so, did it require prior authorization by resolution passed by a $\frac{3}{4}$ vote of all strata owners in a general meeting under Section 71(a) of the SPA, or were there reasonable grounds to believe that it was necessary as an immediate change to ensure safety or prevent significant loss or damage under Section 71(b) of the SPA?
 - c. Was the removal of the trees part of the obligation of the strata to repair and maintain common property and common assets under Section 72 of the SPA?
 - d. If the removal was not authorized under either Section 71 or 72 of the SPA, what is the appropriate remedy?

BACKGROUND AND EVIDENCE

8. The strata is a 40 unit townhouse development in the lower Mission area of Kelowna called Fascieux Creek. It was constructed in the late 1980's and has mature landscaping. As with any construction of that age, there are ongoing issues with repair, maintenance and replacement that the strata must undertake from time to time.
9. The strata states that in early 2017 owners complained that roots from some pine trees were causing problems in crawlspaces of units. The strata council was advised by the strata manager that sales of units were failing to complete due to foundation and structural issues discovered during home inspections.

10. In one inspection report of townhouse unit 403 from May, 2016, subsidence was noted throughout the structure. The slab in the crawlspace had dropped “severely.” It also noted that there was considerable subsidence of the landscaping. The contributing causes for these problems are not stated.
11. Another inspection of townhouse unit 10 from February 2017 also notes settling of the crawlspace floor. Again, the contributing causes are not stated.
12. Aloha Tree Service (Aloha) provided an estimate for tree removal on June 4, 2017, in which it identified 12 trees as a priority for removal, and a further 4 of lesser priority, plus some pruning work. The principal of the company notes in an e-mail to the strata manager that accompanied the estimate that the trees were “A dander [meaning ‘danger’] to structure ie: foundations etc”.
13. For reasons that are not clear, the strata council never passed a resolution authorizing removal of the trees. Based on a communication she received from one strata council member, the strata manager contacted Aloha and directed Aloha to contact that strata council member about the tree removal. That strata council member apparently instructed Aloha to remove the 12 pines.
14. The 12 pines were cut down on September 5, 2017. Ms. Tuddenham e-mailed the strata manager for the reasons for removal that same day. She was eventually advised it was authorized by the strata council for the stated reason that “[t]he trees that were removed were marked as causing of potential to cause issue with cement walkways and foundations currently and or in the near future.”
15. In November, 2017, Ms. Tuddenham coordinated a petition of owners for a special general meeting (SGM) to address concerns about the cutting of the trees.
16. At the December 5, 2017 SGM, two $\frac{3}{4}$ vote resolutions related to the trees failed to pass. The first was to retroactively approve removal of the 12 trees. The second was to have the tree stumps ground down with funds from the strata’s contingency reserve fund (CRF.) In a discussion after the formal meeting, the owners present informally agreed that a study of the causes of the settlement and necessary

corrective measures should be done before any further decisions were made regarding repairs or landscaping.

17. The strata later retained Strata Engineering to conduct a crawl space condition review. Its February 2018 report notes a number of issues with soil settlement, cracking, water ingress and structural support. It says that “[p]resence of large trees in a close vicinity to buildings increases the degree of soil recession.”

POSITION OF THE PARTIES

18. The applicants submit that the strata should pay for the 12 stumps remaining to be ground down and for 12 paper bark maple trees to be planted in the same locations. They have an estimate that this will cost \$3,672. They seek an order that the strata proceed with these measures.
19. They also seek an order directing the strata to make a claim for the cost of the stump removal and replanting with maples through its insurance policy as an errors and omissions matter.
20. The applicants argue that the removal was unauthorized and contrary to the provisions of the SPA.
21. Finally, they seek tribunal expenses of \$225.
22. The respondent submits that the strata council acted in good faith in the exercise of its duties and in the best interests of the owners, and that it exercised due diligence. For this, it relies on the home inspection reports and the 2018 engineer’s report. It also states that at the December 5, 2017 SGM, the owners unanimously defeated a resolution to grind down the trees stumps with the cost borne by the CRF and informally indicated a desire to have no landscaping done until a study was done of the causes of the settlement and necessary corrective measures.

23. For these reasons, the respondent requests that I dismiss the applicant's claim.

ANALYSIS

Was removal of the 12 pine trees from the strata common property a significant change in the use or appearance of that common property under Section 71 of the SPA?

24. It is undisputed that the 12 pine trees were located on the strata's common property.

25. Section 71 of the SPA states that a strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless there has either been a resolution passed by a $\frac{3}{4}$ vote at a general meeting approving it, or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

26. The phrase "significant change in the use or appearance" has been considered in a number of court cases. One of the most recent is *Frank v. The Owners Strata Plan LMS 355*, 2016 BCSC 1206. The court at paragraph 43 applied a non-exhaustive list of objective and subjective factors to be considered. Those relevant here are:

- a. A change will be more significant based on its visibility or non-visibility to residents or to the general public;
- b. Whether the change affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units;
- c. Is there a direct interference or disruption as a result of the changed use?
- d. Does the change affect the marketability or value of the unit?
- e. Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted

similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the SPA?

27. From a review these factors and of the photographs provided of the area where the trees were cut, I find as a fact that this tree-cutting was a significant change in appearance under Section 71 of the SPA. The area had mature trees that sheltered the adjacent townhouses. There are now stumps and no shelter. The change is highly visible to anyone who sees the stumps. The change is not aesthetically pleasing, and it detracts from the use and enjoyment of the adjacent units. I find it can easily affect the marketability and value of the adjacent townhouses. No evidence has been provided for any similar changes in the past. The test is met.

Did the tree removal require prior authorization by resolution passed by a $\frac{3}{4}$ vote of strata owners in a general meeting under Section 71(a) of the SPA, or were there reasonable grounds to believe that it was necessary as an immediate change to ensure safety or prevent significant loss or damage under Section 71(b) of the SPA?

28. The difficulty the strata has here is that, no matter which way I determine this question, the decision to remove the trees was not authorized by either the owners in a general meeting or by the strata council. It was done by a sole strata council member without authority. I will comment on this more when addressing the next issue.
29. I further find that there was no immediate need to remove these trees to ensure safety or prevent significant loss or damage. While there were complaints about the tree roots and there were issues of subsidence, the reasons for the subsidence were not clear. No evidence was provided that immediate removal of the trees was needed. A $\frac{3}{4}$ vote of the owners was necessary before any action could be taken to remove them.

Was the removal of the trees part of the obligation of the strata to repair and maintain common property and common assets under Section 72 of the SPA?

30. I consider this issue as it forms the basis for the strata's submissions in contesting this claim.
31. Under the SPA, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata for the benefit of the owners, unless the SPA provides otherwise.
32. The SPA also states that powers and duties of the strata must be exercised and performed by a council, unless this SPA, its regulations or the strata bylaws provide otherwise.
33. Under Section 72 of the SPA, the strata must repair and maintain common property and common assets.
34. The strata's bylaws also state that it must repair and maintain its common assets and common property.
35. The bylaws further state that at council meetings, decisions must be made by a majority of council members present. They also say that meetings may be held by electronic means and those meetings are deemed to be in-person meetings.
36. The bylaws also say that council may delegate some or all of its power and duties to a council member, but for the reasons I note in the previous paragraph, this would require a majority vote of council members.
37. In this case, no evidence was provided that the strata member who instructed Aloha to cut the trees had any delegated or other authority to do so, and there was no evidence of any majority vote of the strata council to have the trees removed.
38. For these reasons, I do not need to consider whether, had the strata council decided by a majority vote to cut the trees, it would have been authorized by Section 72 to do so. The strata did not authorize cutting the trees. A person with no authority to do so arranged it.

39. Consequently, the tree removal was not lawful under the SPA or strata bylaws. It could only have been done lawfully with a prior $\frac{3}{4}$ vote of all strata owners present at a general meeting.

If the removal was not authorized under either Section 71 or 72 of the SPA, what is the appropriate remedy within the jurisdiction of the tribunal?

40. As noted earlier, under Section 48.1 of the Act, the tribunal has the power to make an order requiring a party to do something. Under Section 61 of the Act, the tribunal may make any order or give any direction in relation to a proceeding it thinks necessary to achieve the objects of the tribunal and its mandate.

41. Applying my discretionary authority to this case, I find that the strata is obliged to remediate the unlawful removal of the trees. As noted earlier, the strata has an obligation to repair common property. The scope of that duty to repair has been interpreted broadly. In the *Frank* case at paragraph 54, the court noted that the words “maintain” and “repair” are broad enough to include alterations of the finish or appearance. That will necessarily be the case here.

42. Applying that principle, I find that the remedies proposed by the applicants are a reasonable way to remediate. The strata will grind down the 12 stumps and plant 12 paper bark maple trees. I will not fix an amount for that work, but leave it to the strata to get quotations on the work and its cost. This work is to be done within 90 days of this decision.

43. Subject to the amount of any insurance deductible, I also order the strata to make a claim with its insurers for the amount it expends on this work. I leave it to the strata to determine if it is properly an errors and omissions claim, or if there are other bases for a claim. I order this as it is in the best interests of the strata owners to reduce costs of the restoration work.

DECISION AND ORDERS

44. I order that:

- a. The strata will arrange to have the 12 tree stumps ground down and to plant 12 paper bark maple trees in the same locations at its cost within 90 days of the date of this decision.
- b. The strata will claim on its insurance policy for the cost of this work unless the cost falls within its deductible.
- c. The strata will pay reimburse the applicants the tribunal fees of \$225, made payable to Kyla Tuddenham.

45. Under section 189.4 of the SPA, an owner who brings a tribunal claim against a strata corporation is not required to contribute to any monetary order issued against the strata corporation or to any expenses the strata corporation incurs in defending the claim. I order the respondent to ensure that no part of the amount ordered to be paid by the respondent, or any other expenses incurred by the respondent in defending this claim, are allocated to the applicant owner.

46. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

47. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision

by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Michael F. Welsh, Q.C., Tribunal Member